No. 22702

In the United States Court of Appeals

For the Ninth Circuit

ETHEL JIMISON and RAY JIMISON,
Plaintiffs and Appellants,

vs.

UNITED STATES OF AMERICA,
Defendant and Appellee.

Brief of Appellee

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Appeal from the United States District Court for the District of Montana, Billings Division

BRIEF FOR THE UNITED STATES OF AMERICA, APPELLEE

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OPINIONS BELOW

The memorandum opinion of the District Court (Judge Jameson) dated May 3, 1967, (R. 224-237)[1] is reported at 267 F. Supp. 674. Judge Jameson's memo-

randum opinion dated November 14, 1967, denying the plaintiffs' motion for a new trial (R. 266-274) is not reported.

JURISDICTION

The jurisdiction of the District Court over plaintiffs' federal tort claim was invoked under 28 U.S.C. Sec. 1346(b). Final judgment was entered on May 26, 1967, (R. 238), from which timely notice of appeal was filed on December 13, 1967, (R. 275). The jurisdiction of this court rests upon 28 U.S.C. Sec. 1291.

STATEMENT OF THE CASE

The appellants' statement ommitted many essential items of fact upon which Judge Jameson based his opinion. It also included many conclusions and characterizations with which the government disagrees. In the interest of brevity the appellee adopts the full text of the facts set forth in the Court's opinion (R. 224-237) filed on May 3, 1967, and the Court's order and opinion (R. 266-274)[2] filed on November 14, 1967, denying plaintiffs' motion for a new trial.

STATEMENT OF ISSUES

1. Whether the District Court's decision was in

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1 Volume I of the record, containing the pleadings, motions, orders, depositions, etc., will be referred to as "R." Volume II, which is the transcript of proceedings at the trial on December 28-29, 1966, will be designated at "Tr."

2 On a motion for a new trial in an action tried before the court without a jury the Court may amend its findings of fact and conclusions of law or make new findings and conclusions. Rule 59(a) Federal Rules of Civil Procedure; McGraw v. Simpson, 141 F.2d 789, 780.

accordance with the applicable law and supported by the evidence.

2. Whether the District Court erred in ruling that the government was excused from responsibility in negligently obstructing a bridge by reason of the fact that a second actor, Bucciarelli, after being in a position to see the hazard in time to avoid the accident, acted negligently and caused the accident.

3. Whether the District Court erred in finding that third-party Bucciarelli had a clear, unobstructed view of both the Jimison car and the government's bridge crane for at least half a mile.

SUMMARY OF ARGUMENT

Under the controlling Montana law a motorist is presumed to see that which he could see by looking and in legal effect is in the position of actually seeing a hazardous condition which is clearly visible. Under such law a negligent first actor is relieved of liability for his negligence in creating such hazardous condition if a second actor is in a position to see or become apprized of said condition in time to avoid an accident by the exercise of reasonable care but is thereafter negligent and causes such accident. In this case the second actor, Bucciarelli, was in legal effect charged with the responsibility of having seen and having been apprised of the hazardous condition on the bridge created by the first actor, the government, in time to

have avoided the accident by the exercise of reasonable care but he was shown by the evidence to have thereafter negligently caused such accident. Said subsequent negligent conduct by Bucciarelli broke the chain of causation between the government's negligence in creating the original hazardous condition and was an independent, intervening cause of said accident.

ARGUMENT

INTRODUCTION

The government is in agreement with appellants' position that the substantive law of the State of Montana is controlling with respect to the questions of negligence and proximate cause. In all of its post-trial briefs before the trial court the government assumed the position that its prior negligence in creating the hazardous condition on the bridge had been established by the evidence and confined its argument to the questions of proximate cause and intervening cause. This brief will assume the same factual position and will limit the scope of its argument to a further discussion of proximate cause and intervening cause as applied to the facts of this case.

It should first be noted that the arguments on proximate cause and intervening cause set forth in appellants' brief are substantially the same as those raised in their initial post-trial brief (R. 172-196), their reply

post-trial brief (R. 211-223), and their brief in support of their motion for a new trial (R. 245-253). It should further be noted that those arguments were very substantially answered and controverted in the government's post-trial brief (R. 256-260) and in its brief (R. 198-210) and memorandum (R. 262-265) filed in opposition to plaintiffs' motion for a new trial, and, that that said arguments were thoroughly analyzed and considered by the trial court in its opinion (R. 224-237) dated May 3, 1967, and in its order and memorandum opinion (R. 266-274) denying plaintiffs' motion for a new trial.

In view of the above situation the government will incorporate herein its arguments in the aforesaid briefs and will attempt to avoid, as much as possible, a repetition of that material and the material covered in the aforesaid opinions of the District Court.

THE MONTANA LAW ON PROXIMATE CAUSE AND INDEPENDENT INTERVENING CAUSE. (Relative to Appellants' Specification of Error No. 1.)

In Montana, a proximate cause is one "which in a natural and continuous sequence, unbroken by any new, independent cause, produces the injury, and without which the injury would not have occurred." **Sztaba** v. **Great Northern Railway Co.,** 1966, 147 Mont. 185, 195, 411 P.2d 239; **Merithew** v. **Hill,** D. Mont. 1958, 167 F. Supp. 320, 327.

The above rule recognizes, in so many words, than "any new, independent cause" will break the original chain of causation. The Montana case of **Boepple v. Mohalt,** 1936, 101 Mont. 417, 54 P.2d 857, considered a factual situation somewhat similar to the instant case. There the plaintiff was injuried while riding as a passenger in an automobile owned and driven by her husband, when it collided with a road grader owned by the State of Montana and operated by one of its employees The grader was headed in an easterly direction, upon its left or north side of the road, and was brought to a stop just before the collision. Plaintiff and her husband both testified that they did not see the grader until it was too late to avoid the collision. In reversing a jury verdict judgment for the plaintiff and holding that the district court should have granted a directed verdict for the defendant, the Montana Supreme Court, in effect, held **as a matter of law** that when a second actor is in a position to see or be apprised of a hazardous condition created by a first actor in time to avoid the accident, but is thereafter negligent and causes such accident, that the second actor's negligence constitutes an independent, intervening cause which breaks the chain of causation stemming from the first actor's negligence. Such holding is even stronger in relieving a ~~second~~ first actor from liability than is the instant case inasmuch as Judge Jameson arrived

at such conclusion, **not as a matter of law, but on the basis of his factual findings.** (R. 224-237, 266-274) In other words this is a case that would have been submitted to a jury if the Federal Tort Claims Act had provision for one

Boepple, at 54 P.2d 861, states:

> "Since the evidence shows conclusively that Boepple could have seen the grader at a distance of at least 239 feet if he had been looking ahead as he should have done, he cannot now be heard to say he did not see it. Under the circumstances, he is, **in legal effect, in the position of having actually seen** the grader at that distance."

The above rule has been consistently followed by the Montana Supreme Court, as indicated in **Monforton** v. **Northern Pacific Railway Co.,** (Mont. 1960) 355 P.2d 501, 510, where the court stated:

> "The dissenting opinion ignores the law in Montana that the driver of a motor vehicle must look not only straight ahead, but laterally ahead. He is presumed to see that which he could see by looking. He will not be permitted to say that he did not see what he must have seen had he looked. The duty to keep a lookout includes a duty to see that which is in plain sight. Monforton is, **in legal effect, in the position of having actually seen the passenger train, in the words of Boepple v. Mohalt. . . .**" Citing cases. (Emphasis supplied.)

Appellants argue that in Boepple the question before the court was not whether or not Mr. Boepple's negligence intervened in and superseded Mohalt's neg-

ligence but whether Mohalt was negligent at all, and therefore, that the court's holding on the question of proximate cause was mere dictum. (Appellants' Brief, P. 19) This argument ignores the following statement of the court at 54, P.2d 862:

> "Since, as we have pointed out, the proximate cause of the accident was Boepple's failure to keep a proper lookout, it follows that there is no merit or force in plaintiff's allegations of negligence with respect to defendant's failure to operate the grader upon the right side of the road and his failure to use sufficient and adequate signs and warnings. Even if it were true that defendant was negligent in these particulars, still it is manifest from what we have said already that such negligence was not the proximate cause of the accident; hence such negligence, even if proved, could avail the plaintiff nothing."

The above statement makes it very clear that the court was reversing the trial court judgment on the ground that plaintiff had failed to establish the "proximate cause" element as a matter of law and that such failure made it unnecessary for the court to consider the "negligence" element. The Appellants' argument further ignores the fact that the same rule on proximate cause was followed with approval in Monforton which cited the Boepple case as the author of the rule.

THE DECISION OF THE DISTRICT COURT IS NOT CONTRARY TO THE OVERWHELMING WEIGHT OF

AUTHORITY. (Relative to Specification of Error No. 1.)

The Government would like to respond briefly to Appellants' argument that the District Court's decision is contrary to the weight of authority although it is felt that the point is moot by reason of the fact that the applicable law in Montana has been clearly and definitely established by the Boepple and Monforton cases.

In support of their argument the appellants have submitted a number of cases, without regard to the method said cases were handled by the respective courts, which appellants urge as support for the proposition that, **as a matter of law,** in order for a first actor to be relieved of liability because of the negligence of a second actor, the first actor **must actually see** the hazardous condition before the chain of causation stemming from the first actor's negligence is broken. Actually, the cases discussed by appellants' fall into three groups, as follows:

1 Those cases which hold that the negligence of the first actor is merely a condition and **not a proximate cause of the accident as a matter of law.**

2. Those cases which hold that the question of whether the negligence of the first actor is merely a condition or whether it is a proximate cause of the accident is **a question of fact for the jury (or the court).**

3. Those cases which hold that the negligence

of the first actor **is a proximate cause of the accident as a matter of law.**[3]

A variety of approaches are used by different courts to determine which classification is appropriate in a particular case. However, the principal criterion generally used to determine the appropriate classification in a given situation seems to be (1) whether the second actor **actually saw** the hazardous condition in time to avoid the accident by the exercise of reasonable care, (2) whether the second actor **was in a position to see** the hazardous condition in time to avoid it, and, (3), whether the second actor **came upon an emergency situation** where the accident could not be avoided.

The above criteria and classifications were discussed in the Government's above-mentioned briefs and also in the opinions of the trial court as was the general law quoted from Prosser, The Restatement of Torts and other authorities. The trial court recognized that the authorities are in conflict in dealing with factual situations similar to that in the instant case (R. 233) but decided that the situation before it called for the application of the Montana law enunciated in the Beopple and Monforton cases. (R. 236)

In seeking to distinguish **Beesley v. United States,**

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3 No case has been cited by appellants or found by the government, under circumstances in any way comparable to the instant case, in which the court held, as a matter of law, that the negligence of the first actor was the proximate cause of the accident.

364 F.2d 194 (Appellants' Brief, P. 42) appellants' assertion that "it is fair to conclude that its driver (the second actor) saw the other two parked vehicles in time to stop but was unable to do so for lack of brakes" is completely unjustified and unfounded in the light of the trial court's finding that the truck driver was "negligent in failing to keep a proper lookout." It is true that the case was decided on appeal without a transcript as stated by appellants but the said trial court's finding clearly leaves no doubt as to the significance of the appellate court's decision in Oklahoma in situations similar to that in the instant case.

THE COURT DID NOT ERR IN FINDING THAT BUCCIARELLI HAD A CLEAR, UNOBSTRUCTED VIEW OF BOTH JIMISON'S CAR AND THE CRANE OPERATED BY RAMSBACHER FOR AT LEAST A HALF A MILE. (Relative to Specification of Error No. 2.)

The scale drawing stipulated into evidence as Appellants' Exhibit 10 (Tr. 10), plus Ramsbacher's testimony marking the location of the bridge crane (Tr. 25-26, 43) on said drawing plus Jerry Jimison's verification of said crane location (Tr. 57) indicates that it is undisputed that it was at least one-half mile from the bridge crane to the near end of the highway curve in question. Jerry Jimison testified that as he approached the bridge he saw something that "looked like a speck of something on the bridge" when he was three-fourths of a mile away. (Tr. 54) Ethel Jimison testified that

"after we had already entered the curve and in the process of going around the curve I noticed something on the bridge." (Tr. 91) Ethel Jimison further testified that "at the time I noticed I couldn't fully distinguish what it was, and as we got closer, just before entering the bridge I noticed a man and something more there, and it wasn't until after we had entered the bridge that I could see he was standing by an object and he was standing near it or beside it there on the bridge." Furthermore, plaintiffs' Exhibits 11 and 12 (Tr. 80) and defendant's Exhibits 8 and 9 (Tr. 106) indicate that the road elevation at said curve is slightly higher than the road entrance to the bridge, that it gradually declines to the bridge elevation, and that the view of the roadway across the bridge and the crane thereon is very good from all points on the highway from the middle of the curve to the bridge. From the above evidence it cannot be doubted that a driver of an automobile at a point as far away as halfway around said curve (which would be well over half a mile from the crane) would have a clear, unobstructed view of said crane and any automobile that happened to be on the road between said driver and the bridge. Appellants argue to the contrary asserting that the Jimison auto blocked Bucciarelli's view of Ramsbacher and the crane. It is submitted, initially, that the Jimison auto certainly could not have been in Bucciarelli's line of sight as he

travelled the last half of the curve (from where Ethel Jimison had noticed something on the bridge) unless said auto had been traveling abreast and to the left of the Bucciarelli automobile which was certainly not the case

Secondly, in attempting to place the cars close together as they came around the curve (Appellants' Brief, P. 45) the appellants are relying solely upon a portion of Ramsbacher's testimony which appellants impeached (Tr. 109), are misinterpreting such testimony, taking it out of context, and, are ignoring a substantial amount of pertinent, reliable evidence to the contrary. Ramsbacher, on direct examination by appellants, first testified "as they (the two cars) came onto the bridge they were fairly close together." (Tr. 32) He next testified, on direct examination by the government, that he could not recall how far the cars were apart when they came around the curve. (Tr. 108) He next admitted, on cross-examination by appellants, that he had previously on May 27, 1965, given a statement to the government wherein he had stated that "both cars were traveling about 30 miles per hour when I first observed them, which was at the approach to the bridge " (Tr. 109)

Further cross-examination by appellants went as follows:

Q. All right. As to the estimation of the speed,

or how close the Bucciarelli automobile was behind the Jimison automobile, is it your recollection now that you don't remember?"

A. "Well, it seems to me that they were fairly close together. That is how come I was more or less interested in them."

Q. **"And when they were close together that is when you tried to stop them?"** (Emphasis supplied)

A. "Yes." (Tr. 110)

On redirect examination by the government, Ramsbacher next testified that "It sticks in my mind I seen them (the cars) as they came around the corner now, which is about three-fourth of a mile." (Tr. 112) However, Ramsbacher never did give any estimate of how close together the cars were when they came around the curve.

The government submits that said testimony as a whole is to the effect that (1) As the cars came onto the bridge they were fairly close together, (2) Ramsbacher had no recollection of how far the cars were apart when they came around the curve, (3) It was when the cars were close together when Ramsbacher tried to stop them, and (4) Ramsbacher's present recollection is that he first saw the cars as they came around the curve. Ramsbacher's recollections in items (2) and (4) were somewhat impeached by appellants when they obtained his admission that he had previously on

May 27, 1965, (when his memory was much fresher) given a statement to the government that "both cars were traveling about 30 miles per hour when I first observed them, which was at the approach of the bridge."

In any event it is difficult to see how the above testimony, in and of itself, has the probative force necessary to compel the conclusion that the two cars were fairly close together (i.e. closer than ¼ mile) as they came around the curve 2100 feet from the bridge, as appellants are now urging upon this court.

Furthermore, the above argument by appellants ignores pertinent, convincing testimony by their witness, Jerry Jimison. Jerry passed Bucciarelli some 6 or 7 miles from the bridge while driving between 60 and 65 miles per hour (Tr. 53) whereas he estimated the speed of Bucciarelli's auto to be 55 mph. (Tr. 68)[4] He maintained his speed (Tr. 53) until he reached the curve when he slowed to 55 mph. (Tr. 54) After passing the curve and approaching the bridge he maintained the 55 mph rate of speed at first but upon getting closer where he could identfy the object on the bridge he applied his brakes and began gradually slowing down. (Tr. 55) When he saw that it was a man and a rectangular object he slowed to 25 to 30

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4 Bucciarelli thought that his speed was between 55 and 60 mph and that the point of passing was three to four miles before he got to the bridge. (Tr. 122) He was unable to make an estimate of Jerry's speed, denied "following on his (Jerry's) tail," and said he didn't see the Jimison car any more. (Tr. 123)

mph. (Tr. 56) He considered changing lanes of traffic and going around the man and object but decided he would not have room to do so inasmuch as two trucks were approaching from the other end of the bridge. (Tr. 56-57) He continued to slow down and brought his car to a stop about 60 feet from the crane when Ramsbacher signalled him to stop. (Tr. 59-60) Ethel Jimison estimated that Bucciarelli collided with the rear of the Jimison car 5 or 10 seconds after it had stopped (Tr. 98) while Ramsbacher estimated the time interval to be 4 or 5 seconds. (Tr. 37) Giving the appellants the benefit of the most favorable speeds and distances to support their argument that the two cars were close together when they came around the curve the Jimison car would have been traveling 60 mph, the Bucciarelli car 55 mph, and the point of passing would have been 4 miles from the bridge or 3½ miles from the curve in question. Thus the Jimison car would have travelled 3½ minutes and covered 18,480 feet (3½ miles) from the point of passing to the curve. The Bucciarelli car would have travelled only 16,940 feet in the same 3½ minutes inasmuch as it was traveling only 55/60 of the speed of the Jimison car. The Bucciarelli car would thus have been approximately 1,540 feet behind the Jimison car as it came around the curve. Jerry's testimony that he slowed down to 55 mph at the curve and continued to slow

down as he approached the bridge indicates that Bucciarelli would have begun closing the distance between his car and the Jimison car when Jerry slowed down at the curve and that the closing process would have continued to the time of the impact. Based upon Bucciarelli's testimony that he was traveling 15 to 20 mph (22.5 to 30 feet per second) (Tr. 128) at the time of impact and the above testimony that 4 to 10 seconds elapsed between the time the Jimison car stopped and the moment of impact the Bucciarelli car would still have been somewhere between 90 and 300 feet behind Jerry when the Jimison car came to a stop. The government contends that the foregoing testimony and analysis, together with Ramsbacher's testimony, clearly supports the conclusion of the trial court that "the Jimison car was a considerable distance ahead of the Bucciarelli car — at least a quarter of a mile — when they came around the curve between one-half to three-quarters of a mile south of the point of impact." (R. 266) It being thus established that the Bucciarelli car was at least a quarter of a mile behind the Jimison car as they came around the curve it follows that there was substantial evidence to support the trial court's finding "that Bucciarelli had a clear, unobstructed view of both Jimison's car and the crane operated by Ramsbacher for at least a half a mile." (R. 236)

BUCCIARELLI WAS NEGLIGENT AND SUCH NEGLIGENCE WAS AN INDEPENDENT, INTERVENING CAUSE OF THE ACCIDENT. (Relative to Specification of Error No. 1.)

Bucciarelli was negligent under the following Montana statutes:

"32-2144. Speed Restrictions—basic rule.
(a) Every person operating or driving a vehicle of any character on a public highway of this state shall drive the same in a careful and prudent manner, and at a rate of speed no greater that is reasonable and proper under the conditions existing at the point of operation, taking into account the amount and character of traffic, condition of brakes, weight of vehicle, grade and width of highway, condition of surface, freedom of obstruction to view ahead, and so as not to unduly or unreasonably endanger the life, limb, property or other rights of any person entitled to the use of the street or highway.

"(c) The driver of every vehicle shall, consistent with the requirements of paragraph (2), drive at an appropriate reduced speed when approaching and crossing an intersection or railway grade crossing, when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding roadway, and when special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway condition."

"32-2160. Following too closely.
(a) The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of

such vehicles and the traffic upon and the condition of the highway."

Mr. Bucciarelli, from the foregoing evidence, should have seen the orange colored crane[5] on the bridge, Mr. Ramsbacher, the trucks on the bridge, and most clearly of all, the Jimison automobile with its brake stoplights flashing which Jerry Jimison testified would have been on steadily for a distance of 800 to 900 feet prior to his coming to a stop. (Tr. 66-67) Expert testimony was introduced that the stopping distance of a 1950 Buick with good tires and brakes, traveling 55 miles per hour on well travelled concrete, would be 261 feet, including reaction time (Tr. 132-135) Bucciarelli testified that his 1950 Buick (Tr. 121) had good tires and good brakes. (Tr. 125) While the presence of the Jimison automobile in front of Bucciarelli just before the impact would have partially obscured some of the above mentioned hazards on the bridge in the last moments before the accident, the Jimison automobile itself was an obstruction which would have been very plain to see for several miles and it would not have been obstructing Bucciarelli's view of the bridge when he came around the curve or when the Jimison auto would have been below Bucciarelli's line of sight to the bridge as indi-

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5 Ramsbacher testified that the crane was a bright orange color on the date of the accident although it had been painted subsequent to the accident and before the picture in evidence as Exhibit 2 was taken. (Tr. 22)

cated in defendant's colored picture in evidence as Exhibit 8 (Tr. 106). It was not a case of Bucciarelli coming upon an emergency situation which had been concealed from view. As Bucciarelli came around the curve and approached the bridge he was charged with the responsibility of seeing the "speck on the bridge" that Jerry saw, the "something on the bridge" that Ethel saw, and the Jimison automobile he was overtaking with brake stop-lights flashing for the last 800-900 feet. He was also charged with the responsibility of being aware of the double "no passing" line which is shown on plaintiff's Exhibit 10 (chart) to run the length of the bridge and to extend continuously therefrom around the highway curve in question. Plaintiff's Exhibits 11 and 12 are photographs clearly showing said double center lines running south from the bridge. Those double lines warned Bucciarelli that it was illegal to pass the Jimison automobile until the double-lined stretch of highway had been traversed by both automobiles. Plaintiffs' Exhibit 20 (Manual on Uniform Traffic Control Devices for Streets and Highways) at 2B-7(b), page 122, states as follows:

> "Where signs or markings are in place to define a no-passing zone . . . no driver shall at any time drive on the left side of the roadway within such no-passing zone or on the left side of any permanent striping designed to mark such no-passing zone throughout its length."

Sections 2B-8 and 2B-9, in addition to said 2B-7 of said Exhibit 20, explain very clearly and completely the application of the highway markings shown in plaintiffs' Exhibits 10, 11 and 12 to the situation in question Said Exhibit 20 was adopted by the Montana Highway Commission pursuant to statute, and has the same effect and dignity as other statutes governing "rules of the road," and is to be construed in conjunction with them. **Faucette v. Christensen,** Mont. 1965, 400 P.2d 883. Bucciarelli was warned by said highway markings that he was required to stay in the right lane of traffic behind the Jimison automobile until he had travelled through the no-passing zone on said highway and that he would have to stop if the Jimison automobile stopped. He was warned by the brake lights on the Jimison automobile that it was being braked and that it might stop for at least 800-900 feet before it actually did stop which was more than abundant warning inasmuch as he could have stopped his Buick in 261 feet, including reaction time. If Bucciarelli found himself in an emergency situation in the final seconds before the collision it was a situation he had gotten himself into because of his own negligence in failing to observe or heed the aforesaid warnings and danger signals that were clearly apparent long before any emergency situation developed. Upon the basis of the foregoing analysis it is apparent that the proxi-

mate cause, and independent intervening cause of the accident was fixed upon Bucciarelli before those final seconds preceding the impact by reason of his aforesaid prior negligence after he was charged with the responsibility of having knowledge and awareness of the hazardous condition.

CONCLUSION

The District Court's factual finding that "Bucciarelli had a clear, unobstructed view of both Jimisons' car and the crane operated by Ramsbacher for at least half a mile" and was in a position to see and become apprised of the hazardous situation on the bridge in time to avoid the accident, and thereafter negligently caused said accident, was amply supported by the evidence. After making such finding of fact the court properly interpreted and applied the Montana law as enunciated in Boepple and Monforton, supra, and held that the negligence of the government's employee, Ramsbacher, merely created a condition and that Bucciarelli's negligence in colliding with the rear of the Jimison automobile after being charged with knowledge of the hazardous condition, was an independent, intervening cause of said accident which broke the chain of causation stemming from Ramsbacher's original negligence in creating said condition.

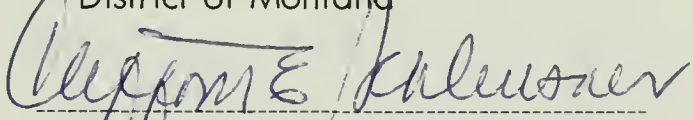
Although there is no doubt that an appellate court may reverse findings of fact by a trial court where they

are "clearly erroneous" such findings of fact are not "clearly erroneous" unless unsupported by substantial evidence or clearly against the weight of the evidence or induced by an erroneous view of the law. **Fleming v. Palmer,** 123 F.2d 749, cert. den., 316 U.S. 662. Additionally, a conclusion reached by a trial court is not "clearly erroneous" even if there is evidence in the record from which different conclusions might have been reached. **Pacific Portland Cement Co. v. Food Machinery & Chemical Corp.,** (C.A. 9, 1950), 178 F.2d 541.

For the foregoing reasons the judgment of the District Court should be affirmed.

Respectfully Submitted.

MOODY BRICKETT
United States Attorney for the
District of Montana



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I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

Clifford E. Schleusner

CLIFFORD E. SCHLEUSNER
Assistant United States Attorney
Federal Building
Billings, Montana

I, Clifford E. Schleusner, one of the attorneys for Defendant and Appellee, in the above-entitled action, hereby certify that on the 30th day of October, 1968, I served the within brief upon Dale Cox, Attorney at Law, Hagenston Building, Glendive, Montana, and Gene Huntley, Attorney at Law, Box 897, Baker, Montana, by depositing a copy in the United States mails, postpaid, addressed to them at their last known address.

Clifford E. Schleusner

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APPENDIX

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